LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 19 1968
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. 320

PERRY J. OWENS,

Petitioner

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

OTTO B. MULLINAX
Counsel for Petitioner
1601 National Bankers Life Building
Dallas, Texas 75201

Of Counsel:
MULLINAX, WELLS, MAUZY, LEVY & RICHARDS

REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8385

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	7
Appendix A — Statute	1a
B — Opinions and Judgment Below	3a
C — Conflicting Opinion	7a

CITATIONS

Page

Cases:

Atkinson v. Roth, 297 F.2d 570, 575 (3rd Cir. 1962) 4

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 484, 53 S.Ct. 252, 255, 77 L.ed. 439 4

Freifield v. Hennessy, 353 F.2d 97, 99 (3rd Cir. 1965) 4

New York C.&St.L. R.R. v. Niebel, 214 F.2d 952 (6th Cir. 1914) 5

Norfolk & Western Ry. v. Earnest, 229 U.S. 114, 122, 33 S.Ct. 654, 657, 57 L.ed. 1096 5

Paluch v. Erie, Lackawana R. Co., 387 F.2d 996 (3rd Cir. 1968) 4

Sears v. Southern Pacific Co., 313 F.2d 498 (9th Cir. 1963) 5

Statutes:

In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. _____

PERRY J. OWENS,

Petitioner

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Perry J. Owens, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 23, 1968.

Opinion below at 393 F (2) 77, is printed in Appendix B hereto, infra, p. 1b. Opinion on rehearing as Appendix C at p. 1c, infra.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 23, 1968. Rehearing was denied on May 28, 1968. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. To determine the duty of the reviewing court in the circumstance where there is a complete absence of probative facts to support the jury answer to a special issue.

2. To declare the application of Rules 50 and 51 to a Federal Employers' Liability Act case.

Statute Involved

The statute involved is 45 U.S.C.A. Sec 53, printed in Appendix A, p. 1a, supra.

Statement

Petitioner, an employee of the defendant, sought to recover under the F.E.L.A. for several acts of negligence, including: "The act of the employee Johnson in losing his foot and falling upon plaintiff." The employee Johnson testified that while wearing goggles over his eyes that had become fogged from the heat of handling hot rivets which interfered with his ability to see clearly and well, started to step across an opening some five or six feet above the plaintiff and missed his step because he was not looking at the place where he was seeking to step but could have made the maneuver had he been looking, and thus fell in upon the plaintiff injuring him. There was no testimony or circumstances to refute Johnson's admitted act of carelessness.

Respondent offered no witnesses as to the accident or its occurrence.

Yet a Dallas, Texas, jury found that the act of the employee Johnson in losing his balance and falling upon the plaintiff was not negligence, as well as absolving the defendant of all other acts of negligence submitted.

Since there were other grounds of primary negligence asserted by petitioner, as well as grounds of contributory negligence asserted by respondent, which did present fact issues for the jury's decision, no motion for directed verdict was requested by Petitioner.

However, when the jury absolved the Petitioner of any contributory negligence Petitioner moved for a judgment n. o. v., before entry of judgment, and alternatively for a new trial, raising the point that there was no evidence to support the jury's answer to this one question and that the undisputed evidence compelled an answer favorable to the Petitioner. Both motions were by the trial court overruled and judgment entered for Respondent, from which judgment Petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit. That Court held that it was "powerless to review" Petitioner's principle contention "... that there was no evidence to support the jury's finding that [a fellow servant] was not negligent [in injuring plaintiff]," giving as its reason Petitioner's failure

to file a motion for a directed verdict or to object to the charge.

Reasons for Granting the Writ

1. The decision of the court below in the instant case is directly in conflict with the decision of the Third Circuit Court of Appeals in *Paluch v. Erie, Lackawana R. Co.,* (Appendix D, p. 7a, infra) 387 F.2d 996 (3rd Cir. 1968); *Freifield v. Hennessy,* 353 F.2d 97, 99 (3rd Cir. 1965); *Atkinson v. Roth,* 297 F.2d 570, 575 (3rd Cir. 1962).

In the *Paluch* case the Third Circuit reached the error of the trial court in submitting contributory negligence when the record showed an absence of any fault and there was no contrary evidence of the existence of any fault, absent any objection to the charge, motion n. o. v., or ground assigned in motion for new trial. That court said "This fundamental error compels a new trial."

2. Since the trial judge did not submit a general charge but submitted special issues, and since the defendant had insisted upon several defenses, Petitioner was not entitled to a directed verdict. *Fairmount Glass Works v. Cub Fork Coal Company,* 287 U.S. 474, 484, 53 S.Ct. 252, 255; 77 L.Ed 439.

3. The failure of the courts to recognize the distinction between "no evidence" and "sufficiency of the evidence" is compounding confusion in the Cir-

cuits. When affirmative eyewitness testimony supports the existence of a fact, and when a detailed search of the record fails to turn up any countervailing probative evidence, a miscarriage of justice is bound to result when the verdict fails to respond to that fact. This very exceptional condition should present a question of law that can be squarely reached; and not hidden under such subterfuges as "fundamental error," "abuse of discretion," "miscarriage of justice."

4. Rules 50 and 51 lend themselves very inexpertly to the use of the plaintiff in an F.E.L.A. case. As pointed out in *Sears v. Southern Pacific Co.*, 313 F.2d 498 (9 Cir. 1963), at common law the relative comparison of the negligence of each party is immaterial, but under the F.E.L.A. the jury must consider not only all acts of negligence (i.e., quantum) but also the quality of each of said acts, citing *Norfolk & Western Ry. v. Ernest,* 229 U.S. 114, 122, 33 S.Ct. 654, 657, 57 L.Ed 1096. As said by the Sixth Circuit in *New York C. & St. L. R.R. v. Niebel,* 214 Fed. 952 (Sixth Cir. 1914):

> "Under the rule of comparative negligence, the jury is entitled to consider all of the circumstances which characterize the negligence of either party and which tend to fix the quantity and quality of that negligence in its relation to the sum total of the negligence of both parties. *Even though the negligence of either party clearly appears,* all circumstances of aggravation or of mitigation must be considered. . . ."

(Emphasis added.)

Assuming evidence that would raise the three grounds of the Railroad Company's negligence and that one such ground exists without dispute, or as a matter of law, in a special issue submission does the trial court hold the one ground back, or give it to the jury with instructions that they cannot disregard it, or submit all grounds without comment? How may plaintiff protect himself? Even though the evidence compels an answer of "yes" to the one issue, he is not harmed by its submission, but only by the jury giving a false answer. The harm flows from the jury not following the evidence, or disregarding the evidence, or refusing to follow the law. This does not become apparent until the answer has been received, and at that moment your Petitioner did file a motion for judgment and followed it with a motion for new trial, raising the very specific error that the jury committed. To permit the false answer to stand is a miscarriage of justice. To refuse to reach it as the Fifth Circuit did smells of pettifoggery. To hold that it is "powerless to review" such contention is to deny Petitioner a fair trial.

5. Clearly, the questions presented are of importance in the application of the Federal Employers' Liability Act. Settlement of the question by this Court is plainly in the public interest since it is likely to arise in every case except the one where there is only a single ground of negligence.

6. The decision of the court below is believed

to be erroneous and the conflicting decision in the Third Circuit is the correct approach to the matter. The appellate courts and the attorneys need a tool by which they can assign errors in law created by a jury refusing to follow the evidence or the law so as to prevent miscarriage of justice when that error becomes apparent after the jury has returned its answers into court.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MULLINAX, WELLS, MAUZY, LEVY & RICHARDS

By Otto B. Mullinax

Otto B. Mullinax

1601 National Bankers Life Building
Dallas, Texas

Attorneys for Petitioner